BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

STEVE MARLEY	)	
Claimant	)	
VS.	)	
	)	Docket No. 213,003
M. BRUENGER & COMPANY, INC.	)	
Respondent	)	
AND	)	
	)	
LEGION INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appeals the June 19, 1998, Award of Administrative Law Judge John D. Clark. The Administrative Law Judge found claimant to be an independent contractor and not entitled to benefits under the Kansas Workers Compensation Act. Oral argument was held on January 27, 1999.

APPEARANCES

Claimant appeared by his attorney, Kelly W. Johnston of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Kirby A. Vernon of Wichita, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations set forth in the Award of the Administrative Law Judge are adopted by the Appeals Board. In addition, the parties stipulate that claimant's post-injury average weekly wage, as of July 15, 1997, is $625.24. The parties also stipulate that, as of that date, claimant is entitled to a functional impairment only, with no additional work disability.

ISSUES

(1) Was claimant an employee of respondent within the meaning of the Workers Compensation Act on the date of accident?

(2) Did claimant suffer accidental injury arising out of and in the course of his employment with respondent on the date alleged?

(3) What was claimant's average weekly wage on the date of accident?

(4) Is claimant entitled to temporary total disability compensation for the period August 28, 1995, through February 6, 1996?

(5) What is the nature and extent of claimant's injury and/or disability?

(6) Is claimant entitled to authorized, unauthorized and/or future medical benefits?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

In August 1995, claimant and his wife signed a contract with respondent allowing respondent to lease claimant's tractor-trailer in consideration for claimant hauling commodities exclusively for respondent. The contract provides that claimant is an independent contractor with respondent. In return, claimant was paid 68 percent of the gross revenues for each run. Following the signing of the contract, and a brief orientation process, claimant drove his first load for respondent from Emporia, Kansas, to Jefferson, Wisconsin, on August 17, 1995. Claimant received 68 percent of the total $980.80 charged for the load, which computes to $666.94. Claimant then traveled from Wisconsin to Chicago, Illinois, where he obtained another load, driving it from Chicago to Wichita, Kansas, where he arrived on August 23, 1995. Claimant was paid 68 percent of the total $750 charge for this load, which computes to $510.

On August 23, 1995, while returning his load to Wichita, Kansas, claimant's load shifted. While helping to unload the truck, claimant was bumped by another individual and knocked off balance. Claimant fell against the side of the trailer and injured his low back. Claimant later delivered another load for respondent following the injury, but the circumstances surrounding that load and the income generated from that job are not relevant to this litigation.

Claimant was initially treated by Dr. Joachim Schnelle, a board certified neurophysiologist. Dr. Schnelle concentrates his practice in the area of family medicine, and first saw claimant for this accident on August 28, 1995. He conducted an examination

and diagnosed a back strain. Claimant underwent an MRI which showed degeneration at L4-5 and L5-S1, with an annular bulge at L4-5 and focal right paracentral protrusions at L5-S1. Dr. Schnelle saw claimant again on August 29, 1995, at which time claimant complained of pain in his back, with radiation into his legs. He was given a series of treatments for the back, and underwent a lumbosacral spine x-ray and ultrasound. Claimant was then taken off work.

Claimant was later referred to Dr. Ron Brown, an anesthesiologist, who specializes in pain management and epidural steroid injections. Claimant underwent two epidural steroid blocks, and was treated conservatively with medication. Claimant's condition did not improve as hoped, and claimant was referred to Dr. John Hered, a neurosurgeon. Neither Dr. Hered nor Dr. Brown felt claimant was a surgical candidate. Claimant continued his treatment with Dr. Schnelle.

Dr. Schnelle last saw claimant on January 9, 1996, at which time claimant continued experiencing pain in his back. Dr. Schnelle did not believe claimant was at maximum medical improvement or ready to return to work at that time. With the history provided, Dr. Schnelle felt that the incident described by claimant was the cause of his ongoing symptoms. He did acknowledge, however, that the MRI indicated the disc herniations at L4-5 and L5-S1 were desiccated or dehydrated, indicating the condition was degenerative and preexisted claimant's accidental injury. Dr. Schnelle provided no functional impairment rating and gave no opinion regarding what, if any, task loss claimant may have suffered as a result of these injuries.

Dr. Schnelle had earlier examined claimant in 1992. Claimant had no complaints to his low back at that time. His treatment of claimant at that time was primarily for depression, as claimant was going through a divorce.

On July 8, 1997, at his attorney's request, claimant was examined by Dr. Edward Prostic, a board certified orthopedic surgeon. Dr. Prostic found claimant to have a slightly smaller right calf muscle than his left calf muscle, most likely posttraumatic in nature. He opined that the atrophy was related to the injury to the S1 nerve root on the right side. He found bilateral tightness of claimant's hamstring muscles. He reviewed the MRI films of August 29, 1995, and diagnosed posterolateral disc protrusions at L5-S1. He also discussed the herniation of the L5-S1 disc, and appears to use the terms "herniation" and "protrusion" synonymously. He also diagnosed a tarsal tunnel syndrome to the left lower extremity, which is not related to this injury. He opined that the work-related accident more likely than not caused or contributed to the herniation of the disc. Dr. Prostic did, however, acknowledge that there were actual degenerative changes and dehydration of the disc at L4-5, which would have preexisted the 1995 injury.

Dr. Prostic rated claimant at 20 percent to the body as a whole, of which 2 percent related to the tarsal tunnel and 18 percent related to claimant's low back symptoms.

Dr. Prostic was provided a copy of James Molski's vocational rehabilitation task loss evaluation performed on claimant. Of the twenty-seven tasks listed, Dr. Prostic felt claimant was incapable of performing ten of those tasks, which equates to a 37 percent loss of task performing ability. While it was pointed out on cross-examination that Mr. Molski's opinion also discussed nine of those tasks being eliminated by an earlier shoulder injury before claimant suffered the 1995 injury to his back, this opinion was not adopted by Dr. Prostic nor discussed by any other physician.

Claimant contends that he was an employee of respondent for the purpose of workers' compensation benefits. Respondent, on the other hand, contends claimant was an independent contractor. There is a Contractor Transportation Agreement in the record which indicates claimant was an independent contractor for the purpose of the contract. However, the contract is not the only factor to be considered. Claimant had certain obligations to respondent which he had to fulfill in order to continue in this relationship. Claimant was required to provide trip reports, fuel tickets, bills of lading, delivery receipts, fuel sheets, driver's logs and trip temperature records any time he was hauling a refrigerated unit. Claimant was also required to furnish the quarterly and annual inspections for the truck, and provide any permits required for transportation through the various states. When the tractor was at its home base, it was required to be stored with respondent. Claimant was also required to furnish his own fuel. While on the road, claimant was required to perform tire checks every two hours on all trailers and temperature checks every four hours or every 200 miles on the refrigerator units. The refrigerator temperature checks were strictly enforced, with specific instructions for various temperatures on specific types of loads. Claimant was prohibited from carrying unauthorized passengers, and could only take his spouse on the trips when he obtained permission in advance. No pets were allowed.

Claimant was required to use the best route available, and to avoid toll roads, if possible. However, claimant could chose his own route if he felt it was quicker for delivery purposes. Vacations were not provided. If claimant wanted time off for any time over two days, he was obligated to obtain advance permission. There were certain dress codes required of both company and contract drivers at certain stops, with certain companies.

All financial arrangements were handled through respondent, with claimant being paid a 68 percent share of the total load from which certain expenses were deducted. Claimant was restricted from any independent hauling and was under exclusive contract with respondent. Respondent also had exclusive possession and control of the trailer unit as long as claimant was under contract with respondent.

Claimant was classified as an operator-owner, which was different than the salaried company drivers employed by respondent. Claimant had the option of picking and choosing the loads he wanted, but the company drivers did not. Company drivers were paid on a per mile basis, while claimant was paid a percentage of the load. Respondent

would provide W-2s for the company drivers, but no taxes were deducted from claimant's income, and claimant was issued a 1099 form at the end of the year. Claimant was responsible for all taxes, both personal and truck-related.

The company drivers were covered by workers' compensation insurance purchased by respondent. Claimant and the other owner-operators were allowed to either purchase their own workers' compensation insurance, or to participate in a health and accident insurance policy through respondent. They were required to purchase one or the other. At the time of the injury, claimant had purchased the health and accident insurance policy from CNA Insurance. The accident resulted in over $8,000 in medical expenses and approximately $32,000 in disability benefits being provided through this policy.

CONCLUSIONS OF LAW

The Appeals Board will first decide whether claimant is an employee of respondent or an independent contractor.

> The test for determining whether an employer-employee relationship exists is whether the employer has the right of control and supervision over the work of the alleged employee and whether the employer has the right to direct the manner in which the work is to be performed, as well as the result which is sought to be accomplished.

Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 198, 558 P.2d 146 (1976).

The parties cite K.S.A. 1996 Supp. 44-503(h)(1) which states in part:

> For purposes of this section, any individual who is an owner-operator and the exclusive driver of a motor vehicle that is leased or contracted to a licensed motor carrier shall not be considered to be a contractor within the meaning of this section or an employee of the licensed motor carrier within the meaning of subsection (b) of K.S.A. 44-508, and amendments thereto, and the licensed motor carrier shall not be considered to be a principal within the meaning of this section or an employer of the owner-operator within the meaning of subsection (a) of K.S.A. 44-508, and amendments thereto . . . .

While the parties acknowledge that this version of K.S.A. 44-503 did not become effective until July 1, 1996, respondent argues that it shows a legislative intent to exclude claimant as an owner-operator from workers' compensation coverage. Claimant, on the other hand, argues the amendment indicates a legislative intent to change the law.

The Kansas Supreme Court has considered instances where a claimant was a truck driver owner-operator of a truck, contracting with companies whose business was to deliver

goods throughout the United States. The Court has held the employer's right to control is an important element in determining what makes an employee or an independent contractor. However, there are many other elements which must be considered. Neither considered nor mentioned by either party is K.S.A. 44-501(g), which states in part:

> It is the intent of the legislature that the workers compensation act shall be liberally construed for the purpose of bringing employers and employees within the provisions of the act to provide the protections of the workers compensation act to both.

No case law cited by the parties discusses this 1993 version of K.S.A. 44-501(g). The Appeals Board acknowledges conflicting evidence in this case could lead to a different result. However, based upon the legislative mandate of K.S.A. 44-501(g) and the facts found herein, the Appeals Board finds that claimant was an employee of respondent on the date of accident. The amount of control exercised by respondent and the level of supervision by respondent over the work of the claimant satisfies the right of control test set forth in Anderson, *supra*. *See also* Knoble v. National Carriers, Inc., 212 Kan. 331, 510 P.2d 1274 (1973).

Did claimant's accidental injury arise out of and in the course of his employment? Respondent provides no evidence to contradict claimant's description of the accidental injury. The Appeals Board, therefore, finds claimant has proven that the accidental injury suffered on August 23, 1995, arose out of and in the course of his employment with respondent.

The next issue is claimant's average weekly wage. The parties agree that, before his injury, claimant drove two trips for respondent. The first to Wisconsin resulted in $980.80 in total revenues. Of that, 68 percent was provided to claimant, totaling $666.94. The second trip from Chicago to Wichita resulted in $750 in total revenues. Of that amount, 68 percent or $510 was paid to claimant. This resulted in a total payment to claimant of $1,176.94. The Appeals Board has held in the past that an employee's average weekly wage should be based upon gross income, while taking into consideration certain business expenses to determine the economic benefit to claimant. *See* Becker v. Becker, Docket No. 183,845 (February 1996). In this instance, claimant was provided a gross income of $1,176.94, with deductions of $853.60 taken out for fuel tax, trailer spot charges, lease payments, workers' compensation premiums, fuel costs and heavy vehicle taxes, leaving $523.34.

Respondent also contends $200 additional should be deducted from this amount as claimant obtained certain advances before going on the runs. However, the money used by claimant from these advances was for personal expenses rather than business expenses. The Appeals Board, therefore, concludes the deduction of this $200 from claimant's average weekly wage is inappropriate.

Respondent further argues that claimant's average weekly wage should be divided by 50 percent, as claimant and his wife co-owned the vehicle in question. However, claimant's wife, while once an over-the-road trucker, has not had a valid commercial driver's license since 1984. In addition, claimant had to obtain special permission in order for his wife to accompany him on these trips. The Appeals Board, therefore, finds that claimant was the driver of the truck in question, and earned the income. While claimant's spouse might share in the income, claimant's spouse provided none of the labor required to obtain this income. The Appeals Board, therefore, finds claimant's average weekly wage to be $523.34.

Is claimant entitled to additional temporary total disability compensation? Claimant was referred to Dr. Joachim Schnelle on August 28, 1995. Dr. Schnelle took claimant off work, and claimant remained off work until February 6, 1996, the last time he was examined and/or treated in this matter. The Appeals Board finds claimant is entitled to 23.29 weeks temporary total disability compensation for the period between August 28, 1995, and February 6, 1996, at the statutory maximum rate of $326 per week.

What is the nature and extent of claimant's injury and/or disability? K.S.A. 44-510e defines the extent of permanent partial disability as:

> [T]he extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.

The only doctor to testify in this case regarding claimant's functional impairment and task loss under K.S.A. 44-510e is Dr. Edward Prostic. Dr. Prostic found claimant to have a 20 percent whole person functional impairment, of which 2 percent related to tarsal tunnel syndrome which is not related to this injury. The Appeals Board, therefore, finds claimant suffered an 18 percent whole body functional impairment resulting from this accidental injury.

Dr. Prostic also provided an opinion regarding what, if any, task loss claimant suffered as a result of this injury. Dr. Prostic reviewed the report of James Molski, claimant's vocational expert, who indicated twenty-seven different tasks were involved in claimant's fifteen-year work history. Of these twenty-seven tasks, Dr. Prostic, in discussing the back injury, opined claimant was currently unable to perform ten, resulting in a 37 percent task loss.

K.S.A. 44-510e requires that the extent of permanent partial general disability be the extent to which the employee, in the opinion of the physician, has lost the ability to perform work tasks that the employee performed in any substantial gainful employment "during the fifteen-year period preceding the accident." Dr. Prostic's testimony is the only physician's opinion regarding tasks eliminated by this back injury. Although Mr. Molski's report mentions that Mr. Marley may have had restrictions before the August 1995 accident, those restrictions, if any, have not been proven. In addition, the record contains no physician's opinion on the effects those preexisting restrictions would have on claimant's task loss. Therefore, the Appeals Board finds that, of the twenty-seven tasks presented to Dr. Prostic, claimant has lost the ability to perform ten, resulting in a 37 percent task loss.

Claimant was taken off work on August 28, 1995, by his treating physician. Claimant did not return to work until July 15, 1997, at which time the parties acknowledged claimant's income exceeded 90 percent of his average weekly wage on the date of accident. From August 28, 1995, through July 14, 1997, claimant earned no income and, therefore, suffered a 100 percent loss of wages. In following the mandate of K.S.A. 44-510e, the Appeals Board averages a 100 percent wage loss and a 37 percent task loss, and finds that claimant has a 68.5 percent work disability through July 14, 1997, and an 18 percent whole body functional impairment thereafter.

The Appeals Board further finds claimant entitled to all authorized medical treatment provided for the low back injury of August 23, 1995. Claimant is also entitled to receive up to the statutory maximum of $500 for any unauthorized care provided, upon presentation of an itemized statement verifying same.

Claimant is further entitled to future medical care upon proper application to and approval by the Director.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated June 19, 1998, should be, and is hereby, reversed, and that the claimant, Steve Marley, is granted an award against the respondent, M. Bruenger & Company, Inc., and its insurance carrier, Legion Insurance Company, for an accidental injury occurring on August 23, 1995, and based upon an average weekly wage of $523.34. Claimant is awarded a 68.5 percent permanent partial disability to the body as a whole through July 14, 1997, and an 18 percent whole body functional impairment thereafter.

Claimant is entitled to 23.29 weeks of temporary total disability compensation at the rate of $326 per week totaling $7,592.54, followed thereafter by 74.71 weeks of permanent

partial disability compensation at the rate of $326 per week in the amount of $24,355.46 based upon a 68.5 percent work disability payable through July 14, 1997. Thereafter, no additional weeks of permanent partial disability compensation are due for the 18 percent whole body functional impairment. This makes a total award of $31,948.00, which is all due and owing at the time of this Award and ordered paid in one lump sum minus any amounts previously paid.

Claimant is further entitled to authorized, unauthorized and future medical care per this Award.

Claimant's contract for attorney fees is approved insofar as it does not contravene K.S.A. 44-536.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier to be paid as follows:

Barber & Associates	
Discovery deposition of Steven Marley	$479.20
Braksick Reporting Service	
Deposition of Edward J. Prostic, M.D.	Unknown
Deposition Services	
Transcript of regular hearing	$311.05
Bannon & Associates	
Transcript of continuation of regular hearing	$283.10
Deposition of Teresa Williams	$312.90
Deposition of Lonnie Edward Collins	$160.90
Deposition of Steven F. Marley	$190.30
Ireland Court Reporting, Inc.	
Deposition of James Molski, MS, CRC	$166.10
Deposition of Janet Marley	$180.00
Deposition of Joachim Schnelle, M.D.	$267.00

IT IS SO ORDERED.

Dated this ____ day of July 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Kelly W. Johnston, Wichita, KS
Kirby A. Vernon, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director